87-2020

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLARD W. MANN, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

DID THE INTRODUCTION OF HARD CORE, SEXUALLY EXPLICIT MAGAZINES TO PROVE APPELLANT'S INTENT TO SATISFY HIS SEXUAL DESIRE DENY HIM HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

STATUTES – Continued:

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v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Willard W. Mann, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on April 11, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 26 M.J. 1 (C.M.A. 1988) (Appendix A). The original decision of the United States Air Force Court of Military Review is published at 21 M.J. 706 (A.F.C.M.R. 1985) (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. §867(h) (Supp III 1985) and 28 U.S.C. §1259(3) (Supp III 1985). The judgment of the United States Court of Military Appeals was rendered on April 11, 1988.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law. . . .

MANUAL FOR COURTS-MARTIAL PROVISIONS INVOLVED

Military Rules of Evidence 404 provides in pertinent part:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . .
>
> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Article 134, Uniform Code of Military Justice, provides in pertinent part:

> **Article 134 (Indecent acts or liberties with a child)**
>
> b. *Elements.*
>
> (1) *Physical contact.*
>
> (a) That the accused committed a certain act upon or with the body of a certain person;
>
> (b) That the person was under 16 years of age and not the spouse of the accused;

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

STATEMENT OF THE CASE

Petitioner was tried by general court-martial before officer members at Homestead Air Force Base, Florida, on 19-21 February 1985. He was convicted of two specifications of committing an indecent assault upon A.L.M., a female under age 16, with the intent to arouse his lust and sexual desires. Additionally, he was convicted under Article 125, Uniform Code of Military Justice (U.C.M.J.), of one specification of committing sodomy with A.L.M., a child under the age of 16. He was sentenced to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to the pay grade of airman basic (E-1). The convening authority approved the sentence as adjudged on April 17, 1985. The Air Force Court of Military Review affirmed the findings of guilty and the sentence on December 3, 1985. The United States Court of Military Appeals affirmed that decision on April 11, 1988.

Both specifications of Charge I under Article 134, (U.C.M.J.) allege that petitioner committed indecent acts against his step-daughter, A.L.M., by inserting foreign objects into her vagina with the intent to arouse his lust

and sexual desire. Thus petitioner's intent with respect to his sexual desires was an element of the offenses. A.L.M., the victim of those charges, testified at trial that petitioner bound her to a chair with socks and committed the charged acts. In addition, Mrs. Karen Mann, petitioner's wife, testified that she had found several items in Sgt Mann's tool box stored in the outside shed of their Homestead Air Force Base house. Among these items was an electrical vibrating sexual device identified by A.L.M. as being the one petitioner attempted to insert inside of her. Mrs. Mann also testified that she had found some vaseline and some sexually explicit magazines. Two of these magazines "Young Snatch" and "Tight Twats" (Prosecution Exhibits 4 and 5) were hard core "girlie" magazines showing fully developed women in graphic sexual poses, sometimes using sexual aids. The third magazine was entitled "Show Me" and was a self-described sexual education manual intended for parents to use while instructing their children on sexual matters.

Petitioner took the stand in his own defense and denied that any of the charged incidents occurred. He testified that he had bought the electric vibrator as a gag gift some years before but was too embarrassed to give it to the intended recipient. As to the two "girlie" magazines he admitted that he liked to read them. He also said he bought the sex education manual to teach his children about sex, but felt they were too young for its content.

Before petitioner even testified in his own defense the military judge had ruled on the admissibility of the three magazines. The government trial counsel had offered them as part of her case in chief. The judge made findings that the "Show Me" magazine was "purely educational" and that the other two magazines portrayed fully developed females, none of whom were A.L.M.'s age. He

found that all three magazines were relevant on the issue of the sexual desires of the petitioner who was obviously predisposed sexually towards young girls.

REASON FOR GRANTING WRIT

There exists an apparent difference in the way the various Federal circuits and the United States Court of Military Appeals handle the question of when evidence of an accused's intent should be admitted at a criminal trial. Some circuits allow all evidence to be admitted during the government's case in chief while others may require the prosecutor to hold back until after the defense has the opportunity to present his case. Compare *United States* v. *Fearns*, 501 F.2d 486 (7th Cir. 1974); *United States v. Juarez*, 561 F.2d 65 (7th Cir. 1977); *United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986); *United States v. Leonard*, 524 F.2d 1076 (2nd Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) with *United States v. Holman*, 680 F.2d 1340 (11th Cir. 1982); *United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R. 1983), Pet. denied 17 M.J. 204 (C.M.A. 1983). The underlying reason for this difference is that the circuits view differently the question of when an accused's intent is placed squarely in issue.

We first note that although uncharged misconduct is admissible in trials to prove an accused's intent it is not admissible to prove he is a bad person, thus likely to have committed the charged act. Fed. R. Evid. 404(b); Mil. R. Evid. 404(b). *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978). When determining whether the accused's intent has been placed sufficiently in issue some circuits have held that every "not guilty" plea to an offense which has intent as an element places the accused's intent in issue. See *Holman, supra*. Other circuits have held that we must first examine the posture of the defense's case to determine if intent has actually been placed in issue by the accused.

See *Fearns, supra*. In this regard there are two types of not guilty pleas. The first type of case is the not guilty defense which asserts that the charged acts never occurred. In this situation the acts may be said to speak for themselves on the issue of intent. If the jury believes the acts occurred then the requisite intent would naturally follow. A perfect example of this is the present case. If one believes that Sgt Mann actually tied A.L.M. to a chair and attempted to insert foreign objects into her one will automatically assume such acts were done to satisfy his sexual desires. In this type of case the uncharged misconduct, here the magazines, really goes to prove that the accused actually performed the charged acts since he is obviously the type of person likely to do such things.

The other situation is where the accused admits doing the acts but specifically denies that he had the requisite intent. For example, had Sgt Mann taken the witness stand admitted that the acts occurred but claimed some different intent (for example, sexual education of the child) then by his own defense he would have placed his intent squarely in issue. *See e.g., People v. Kelly*, 66 Cal.2d 232, 424 P.2d 947 (Cal. 1967). In that situation the accused has squarely placed his intent in issue so that proof of uncharged acts quite clearly go to proving his intent.

Applied to the facts of this case Sgt Mann's defensive position fell into the former category. He stated that the acts of child abuse never occurred. Had the jury believed that he actually tried to insert artificial sexual devices into his stepdaughter then his intent to satisfy his sexual desires would be a logical conclusion. Thus, by admitting into evidence, the sexually explicit magazines, the military judge allowed the jury to conclude that Sgt Mann was a "sexual pervert" and thus very likely to have committed the sexual assaults. Had the judge waited to rule on the admissibility

of that evidence until after the defense presented its case he would have realized that the issue of intent was not squarely raised by the defense.

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219 (1941); *Blackburn v. Alabama*, 361 U.S. 199 (1960). The defense respectfully submits that the practice of admitting evidence of other bad acts to prove the accused's intent violates the due process clause of the United States Constitution when the evidence is admitted before the defense presents its case.

It places the accused in the untenable position of explaining other obvious sexual interests while denying that the sexual acts he is charged with ever occurred. Evidence, whether true or false, if wrongly used is a denial of due process. *Id.*

CONCLUSION

We must submit that it is impossible for the defense to receive a fair trial once such evidence is before the jury in a case where the accused denied ever committing the charged acts.

WHEREFORE, appellant prays for a grant of certiorari to review the decision of the United States Court of Military Appeals in this case.

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APPENDIX

UNITED STATES COURT OF MILITARY APPEALS

No. 54,097
ACM 24786

UNITED STATES, APPELLEE

v.

WILLARD W. MANN, STAFF SERGEANT, U.S. AIR FORCE, APPELLANT

April 11, 1988

Opinion of the Court

SULLIVAN, Judge:

Appellant was tried by a general court-martial composed of a military judge and members during February 1985 at Homestead Air Force Base, Florida. Contrary to his pleas, he was found guilty of three specifications of committing indecents acts with his 9-year-old daughter and one specification of committing sodomy upon her, in violation of Articles 134 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 925, respectively. He was sentenced to a dishonorable discharge, confinement for 25 years, total forfeitures, and reduction to the lowest enlisted pay grade. The convening authority approved the findings of guilty and sentence, and the Court of Military Review affirmed. 21 M.J. 706 (A.F.C.M.R.1985).

This Court granted the following issues for review:

I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING INTO EVIDENCE PROSECUTION EXHIBITS 3, 4 AND 5, AS THESE MAGAZINES WERE NOT RELEVANT TO THE CHARGED OFFENSES.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN HOLDING THAT THE MILITARY JUDGE'S ABUSE OF DISCRETION IN ALLOWING M.M'S TESTIMONY CONCERNING ACTS OF UNCHARGED MISCONDUCT ALLEGEDLY COMMITTED BY APPELLANT WAS HARMLESS ERROR.

Appellant also filed a petition for new trial with the Judge Advocate General of the Air Force, which was forwarded to this Court in accordance with Article 73, UCMJ, 10 U.S.C. § 873. We resolve the granted issues against him and deny his petition for new trial, as well.[1]

The Court of Military Review's opinion contains the facts necessary to resolve these issues, as follows:

> Very briefly stated, the accused was convicted of committing the following misconduct: 1) between 4 April 1983 and 19 March 1984, an indecent assault upon A.L.M. by removing her pants and underpants, tying her to a chair, and attempting to insert an electrical, artificial penis into her vagina; 2) between 4 April 1983 and 19 March 1984, an indecent assault upon A.L.M. by applying vaseline to a thermometer and inserting it into her vagina; 3) on divers occasions, between 13 December 1982 and 19 March 1984, indecent assaults upon A.L.M. by inserting his finger into her vagina; and 4) between 4 April 1983 and 19 March 1984, sodomy upon A.L.M. [21 M.J. at 797.]

* * * * *

[1] The petition for new trial has been closely examined by this Court, and we conclude that appellant has failed to justify such relief under Article 73, Uniform Code of Military Justice, 10 U.S.C. § 873. *See United States v. Thomas*, 11 M.J. 135 (C.M.A.1981).

II

During the findings portion of the trial, over defense objection, trial counsel presented the court members with three magazines, as well as testimonial evidence of uncharged misconduct. Appellant now asserts the military judge abused his discretion by allowing such materials into evidence.

The appellant's wife found the three magazines in his tool box which was locked and kept in a storage shed at their on-base quarters. In addition to the magazines, the tool box also contained an electrical artificial penis, a jar of vaseline, some balloons, and some women's panties. His wife had never seen any of these items before. Appellant admitted he had purchased the artificial penis some time ago as a gag gift for some friends, but was too embarrassed to give it to them; and he had purchased the magazines several years ago as well. One of the magazines is categorized as a sex education manual for parents with small children. Appellant asserts it has no probative value and is inadmissible under Mil.R.Evid. 402. The appellant says the other two magazines are not relevant because they do not show sexually explicit pictures of children, but only contain pictures of grown men and women. He concludes they are offered only to show he is a bad man and that this purpose is in contravention of Mil.R.Evid. 404(b). [21 M.J. at 708.]

* * * * *

The first of the magazines offered by the government in this case was labeled as a sex education manual and, as found by the military judge:

> It depicts people from birth to adulthood, young children nude of opposite sex together not in suggestive poses, a young boy holding an erect penis, a father naked playing with his youngish naked

> daughter, a young boy with an erection touching the small breasts of a young but older female, and a young girl fondling the penis of a younger male, and et cetera.

As described by the military judge, the manual contains approximately 140 pages of photographs of naked children and adults. In some poses, the adult models are engaging in sexual activities while the children are apparently watching. The other two magazines "depict young ladies having reached puberty in various poses with at times sexual aids, some nonelectric, others apparently of the electric type. Most of these young girls appear developed, with breast development and pubic hair. None appear to be non-teenagers." This Court would further note that in most of the photographs the young ladies are either using a sexual device, or have one or more fingers inserted in their vaginas. [*Id.* at 709.]

* * * * *

The uncharged misconduct evidence appeared in the form of testimony by M.M., the eleven year old adopted son of appellant, and half-brother of A.L.M. Following defense objection, M.M. was permitted to testify that four or five years ago, while the family was living in Alaska, appellant committed several sex offenses on M.M. At the time of these offenses M.M. was seven years old and his mother was out of the house. One of the offenses was that, on one occasion, appellant sucked M.M.'s penis. The other offenses were that, on approximately four occasions, appellant took M.M. and A.L.M. into the bathroom. With both of them naked, he would have M.M. lay on A.L.M. and attempt to place M.M.'s penis into her vagina. A.L.M. variously testified, either these events did not happen, or she does not remember them happen, or she does not remember them happening. The government's theory of ad-

missibility was that the acts were evidence of a common scheme or plan. Mil.R.Evid. 404(b). Appellant objected that these acts were not "close enough in time, place and circumstances to be relevant," and further, they were not plain, clear and conclusive in light of A.L.M.'s failure to corroborate M.M.'s testimony. [21 M.J. at 709-10.]

I

Appellant was charged with and found guilty, *inter alia*, of indecent acts with a child under 16 in violation of Article 134. The acts alleged to have occurred all involved the insertion of some object, other than appellant's penis (*e.g.*, vibrator, thermometer, finger), into the young girl's vagina. *See generally United States v. Thomas*, 25 M.J. 75 (C.M.A.1987). As an element of specific intent, the prosecution was also required to show that the accused committed the act with "intent . . . to arouse, appeal to, or gratify the lust or passions or *sexual desires of the accused* or the child or both." (Emphasis added.) Para. 213*f*(3), Manual for Courts-Martial, United States, 1969 (Revised edition). *See* para. 87, Part IV, Manual for Courts-Martial United States 1984. Consequently, appellant's sexual interests with regard to young girls and penile-substitute penetration was a material issue for the members to resolve. Mil.R.Evid. 404(b), 1984 Manual, *supra*. *See United States v. Owens*, 21 M.J. 117, 123 (C.M.A.1985); *United States v. Watkins*, 21 M.J. 224, 227 (C.M.A.) (Cox, J., lead opinion), *cert. denied*, 476 U.S. 1108, 106 S.Ct. 1956, 90 L.Ed.2d 364 (1986).

The first question for the military judge was whether the challenged pictorial evidence was relevant to show that appellant had this sexual desire during the charged acts. *See* Mil.R.Evid. 401. In other words, could these photographs be naturally interpreted as reflecting a passion on his part

at that time towards young girls and sex acts involving penile substitutes? *See generally* 2 Wigmore, *Evidence* § 399(b) and (c) (Chadbourn rev. 1979). We note that these magazines were shown to be possessions of appellant around the time of the charged offenses. Also they were stored at the scene of the crime with sexual implements of accessories similar to those allegedly used in two of the charged acts. Finally, the pictures in the manual and the magazines, if not individually by suggestion, then together in effect, embrace all the elements of the particular sexual deviancy which appellant was alleged to harbor. Clearly, the act of possessing these materials under these circumstances could reasonably be viewed as reflecting or tending to reflect his sexual desires during the charged acts. *See United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R.), *pet. denied,* 17 M.J. 204 (1983); *Coile v. State*, 212 So.2d 94 (Fla.App.1968); *see generally Jarabo v. United States*, 158 F.2d 509, 513-14 (1st Cir.1946); *R. v. Thompson*, 2 K.B. 630 (1917).

The second question facing the military judge was whether this pictorial evidence should nonetheless be excluded because of its potential for undue prejudice. *See* Mil.R.Evid. 403. Admittedly, some of these pictures are quite graphic and might lead to a conclusion that their possessor was a sexual pervert. Moreover, an impermissible inference might be further drawn that because appellant was particularly interested in sex acts with children involving penile substitutes, he was a bad person who probably did the charged acts. *See* Mil.R.Evid. 404(a). However, appellant pleaded not guilty to the charged offenses, testified that they did not occur, and further stated that he only innocently bathed or tickled the victim. *See generally United States v. Lau*, 828 F.2d 871, 874 (1st Cir.1987); *see United States v. Watkins, supra.* Consequently, intent in doing these acts had become a necessary

and contested issue in this case which enhanced the probity of the challenged evidence and justified its admission under Mil.R.Evid. 403. *See United States v. White*, 23 M.J. 84 (C.M.A.1986); *United States v. Burkett*, 821 F.2d 1306, 1309 (8th Cir.1987). *Cf. United States v. Soundingsides*, 825 F.2d 1468 (10th Cir. 1987). We find no error in the admission of this pictorial evidence under such circumstances.

II

The second issue in this case is whether the military judge erred in admitting testimony from the victim's brother concerning past acts of sexual misconduct purportedly committed by appellant on him and his sister. We do not totally agree with the Court of Military Review's rationale for concluding that the judge abused his discretion in admitting this evidence. However, we agree with the court below that admission of this evidence, if error, was harmless. *United States v. Barnes*, 8 M.J. 115 (C.M.A.1979); *see United States v. Gonzalez-Sanchez*, 825 F.2d 572, 580 (1st Cir.1987). *See generally United States v. Weeks*, 20 M.J. 22 (C.M.A.1985).

The most important issue in this case was whether the sexual acts testified to by the victim actually occurred. The defense asserted that these acts did not occur. It did not concede that the acts occurred and claim they were perpetrated by someone other than appellant. Accordingly, it was the occurrence of the acts, not appellant's identity as the perpetrator of these acts, which was the central issue in dispute.[2]

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[2] The prosecution was required to prove that appellant was the person who committed the charged offenses. However, numerous acts were testified to by appellant's daughter, rendering slight the possibility of misidentification of her father as the perpetrator. *Cf. United States v. Cordova*, 25 M.J. 12 (C.M.A.1987).

Evidence of a common scheme or plan to do certain acts is relevant to show that the charged acts were done as parts of this plan. *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A.1984). *See United States v. Brooks*, 22 M.J. 441, 444 (C.M.A.1986). If the Government showed that appellant planned to commit indecent acts with his children, then this would be some circumstantial, yet corroborative, proof that he committed indecent acts with his 9-year-old daughter as she testified in this case. To evidence this plan, the Government offered proof that on numerous occasions over the past 5 years appellant committed similar indecent acts with his three children, including the victim, at home when the mother was absent. The military judge particularly found that the boy's testimony that appellant on four occasions attempted to insert his penis into his sister's vagina while the mother was not home reflected such a plan or common scheme.

We disagree with the Court of Military Review "that these acts were not 'close enough in time, place and circumstances to be relevant.' " 21 M.J. at 710. The apparent remoteness of some of these acts (5 years) does not undermine their relevance where the youth of the victim is an important component of the averred plan. *See generally United States v. Burkett*, 821 F.2d at 1309-10. Moreover, the bizarre similarity of the indecent acts, the common situs of their commission in the home, and the usual time of occurrence during the mother's absence strongly indicate that more than "a collection of disparate acts" is involved. *Cf. United States v. Rappaport*, 22 M.J. 445, 447 (C.M.A.1986). The military judge did not abuse his discretion in concluding that these prior acts were probative of a plan on appellant's part to sexually abuse his children. Mil.R.Evid. 401.

In any event, we agree with the Court of Military Review that the challenged evidence of these acts should

have been excluded under Mil.R.Evid. 403. Appellant denied these acts occurred, the victim of the charged offenses disclaimed any memory of these acts, and the brother's testimony was not specific. *Cf. United States v. York*, 830 F.2d 885, 894 (8th Cir.1987); *United States* v. *Evans*, 697 F.2d 240, 249 (8th Cir.), *cert. denied,* 460 U.S. 1086, 103 S.Ct. 1779. 76 L.Ed.2d 350 (1983). Consequently, the members were unnecessarily tasked with determining whether the four acts of uncharged misconduct occurred before they could decide whether the charged acts occurred. Mil.R.Evid. 403 was designed to avoid such confusion.

The error in admitting the brother's testimony, however, was clearly harmless. Art. 59(a), UCMJ, 10 U.S.C. § 859(a). *See United States v. Barnes, supra.* Mil.R.Evid. 103(a). Overwhelming evidence of guilt was presented by the Government in this case which included the clear and unambiguous testimony of the victim, corroborative medical testimony from an examining physician concerning the victim's scarred vagina, and the damaging physical evidence of the vibrator and vaseline. Moreover, to some extent the brother's testimony of prior uncharged sexual acts by appellant on him was cumulative since both his sisters testified without objection to uncharged indecedent acts appellant purportedly committed upon them. Finally, the particular and thorough instruction of the military judge focused the members on their priorities and ensured that this testimony would not be used for an improper purpose. *See United States v. Gonzalez-Sanchez*, 826 F.2d at 582.

Appellant's petition for a new trial is denied.

The decision of the United States Air Force Court of Military Review is affirmed.

Judge COX concurs.

EVERETT, Chief Judge (concurring in part and dissenting in part):

I conclude, as did the majority in the Court below, that the military judge did not err in admitting into evidence the three sexually explicit magazines. One of the magazines—a purported sex-education manual—quite clearly portrays, both textually and pictorially, intimate sexual contact between adults and young children. The other two, on the other hand, appear to be rather typical pornography—hard-core, no doubt, but not themselves particularly focused on the type of offenses here at issue. However, it is significant to me that these magazines had been stored by appellant in a locked shed with implements similar to those used in two of the alleged crimes. I would feel more comfortable with the result, though, if the Government had offered expert testimony to confirm the common-sense inference that possession of such magazines under these circumstances tends to prove that the possessor desired to commit sexual assaults on young girls. Without such testimony, I could not fault the military judge if he had excluded the magazines, consistent with the rationale of Judge Murdock's dissent below.

I also agree with the court below that the military judge abused his discretion in allowing the alleged victim's half-brother to testify about several sex offenses committed on him by appellant 4 or 5 years before. As the Court of Military Review concluded, these offenses were too remote in time and place to sustain the Government's theory of admissibility—namely, that they evidenced a common scheme or plan.

My only disagreement with the court below concerns their failure expressly to reassess the sentence adjudged in light of their conclusion that the judge had erred by admitting the evidence of appellant's prior misconduct.

Therefore, I would affirm the findings and remand the case to the Court of Military Review solely for reassessment of sentence.

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEWS

ACM 24786

UNITED STATES

v.

STAFF SERGEANT WILLARD W. MANN, FR 240-94-3969
UNITED STATES AIR FORCE

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3 DECEMBER 1985

Before

FORAY, MURDOCK and O'HAIR
Appellate Military Judges

DECISION

O'HAIR, Judge:

Following his trial by general court-martial, the appellant was found guilty of three specifications of committing indecent acts, and one specification of sodomy, upon his nine year old daughter, A.L.M. He was found not guilty of a specification alleging he committed indecent acts upon another younger daughter and a specification alleging he unlawfully struck his wife.

Very briefly stated, the accused was convicted of committing the following misconduct: 1) between 4 April 1983 and 19 March 1984, an indecent assault upon A.L.M. by removing her pants and underpants, tying her to a chair,

and attempting to insert an electrical, artificial penis into her vagina; 2) between 4 April 1983 and 19 March 1984, an indecent assault upon A.L.M. by applying vaseline to a thermometer and inserting it into her vagina; 3) on divers occasions, between 13 December 1982 and 19 March 1984, indecent assaults upon A.L.M. by inserting his finger into her vagina; and 4) between 4 April 1983 and 19 March 1984, sodomy upon A.L.M.

I

All of the offenses heard by the court-martial were alleged to have occurred on Homestead Air Force Base, Florida, with the exception of Specification 3 of Charge I, which alleges the accused did, "in Dade County and Homestead Air Force Base, Florida," on divers occasions, insert his finger into her vagina.[1] In the first assignment of error, appellant avers the court-martial lacked subject-matter jurisdiction over that portion of the specification alleging indecent acts which occurred off-base in Dade County, Florida.

In every instance of off-base, criminal misconduct within the United States, the court-martial has no jurisdiction to hear the case unless there is a service connection between the misconduct and the interests of the Armed Forces to prosecute the offender. *See* R.C.M. 203 and the discussion which follows. This requirement for a finding of the presence of a service connection was first developed in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). As a result, jurisdiction determining factors must be set out for the military judge on the charge

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[1] Upon his arrival at Homestead Air Force Base, appellant and his family resided in off-base civilian quarters in Homestead, Dade County, Florida, from June, 1982 until 1 April 1983, at which time he and his family began occupying on-base government quarters.

sheet and incorporated in his findings. A vague recitation of the "Jurisdictional Basis" on the charge sheet will not suffice. *See* R.C.M. 307(c) Discussion (F). Additional facts to support a conclusion there is military jurisdiction in a given case can also be presented at trial in the form of testimony and stipulations. Furthermore, the issue of subject-matter jurisdiction over off-base misconduct cannot be waived, even if it is not raised at trial. R.C.M. 905(e).

Once the facts are before a court-martial, the military judge must evalute them and make findings regarding the existence of subject-matter jurisdiction, a subject which has evolved since such landmark decisions as *O'Callahan, supra, Schlesinger, Relford, Murray v. Haldeman, Lockwood,* and *Trottier.*[2] The common theme of these decisions is that there must be a finding of service connection arising from an off-base offense before subject-matter jurisdiction will exist. In *Lockwood, supra*, the Court of Military Appeals affirmed the exercise of jurisdiction for off-base offenses of forgery and larceny, relying heavily on such intangible considerations as the impact these offenses had on the personnel of the base where the accused was stationed, and the "morale, reputation and integrity of the base itself." This standard has been recently applied by this Court in *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985), a case involving an officer who committed off-base indecent acts with a ten year old girl who was neither his daugher nor a member of his household. There, the facts indicated the victim's parents were both

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[2] *Schlesinger v. Councilman*, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975); *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983); *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980).

NCO's and this incident greatly lessened the respect they had for the appellant as an officer. The parents also required time off from work to obtain counselling for the victim. The case was initially investigated by a civilian agency but both the base and civilian authorities concluded it would be in the best interests of the child and the community if the military took jurisdiction.

Examining the facts of the case before us, those found both in the pleadings and in the evidence before the court, we find that the bulk of the misconduct occurred on a military reservation, whereas a lesser amount occurred in off-base quarters and continued after the accused and his family moved on base; the misconduct was reported to a civilian law enforcement agency, but was later referred to the Air Force Office of Special Investigations for a detailed investigation of the allegations; the victim was initially examined in a civilian medical facility; and at the time of trial she was in the midst of receiving long-term rehabilitative counselling from a civilian psychotherapist. As was emphasized by appellate government counsel, these contacts with civilians certainly resulted in a tarnishing of the reputation and image of the Armed Forces. Furthermore, the interests of judicial economy, the desire to dispose of the alleged offenses expeditiously, and the concern for the welfare of the victim, A.L.M., were best served by trying all offenses in the same forum. We may also infer from appellant's failure to object to the court's jurisdiction that he preferred to have all charges heard by this court-martial. *Lockhood, supra.* Based on the above, we find the court appropriately exercised subject-matter jurisdiction over appellant's off-base indecent acts with A.L.M.

II

During the findings portion of the trial, over defense objection, trial counsel presented the court members with three magazines, as well as testimonial evidence of uncharged misconduct. Appellant now asserts the military judge abused his discretion by allowing such materials into evidence.

The appellant's wife found the three magazines in his tool box which was locked and kept in a storage shed at their on-base quarters. In addition to the magazines, the tool box also contained an electric artificial penis, a jar of vaseline, some balloons, and some women's panties. His wife had never seen any of these items before. Appellant admitted he had purchased the artificial penis some time ago as a gag gift for some friends, but was too embarrassed to give it to them; and he had purchased the magazines several years ago as well. One of the magazines is categorized as a sex education manual for parents with small children. Appellant asserts it has no probative value and is inadmissible under Mil. R. Evid. 402. The appellant says the other two magazines are not relevant because they do not show sexually explicit pictures of children, but only contain pictures of grown men and women. He concludes they are offered only to show he is a bad man and that this purpose is in contravention of Mil. R. Evid. 404b.

The government's theory of admissibility, and the essence of the instruction given to the court members, was that all three magazines could be considered for their tendency, if any, to prove that the alleged acts of indecent assault (Charge I) were done with the intent to arouse the lust and sexual desires of the appellant, which was one of the elements of those offenses. The government cites *United States v. Woodyard*, 16 M.J. 715, (A.F.C.M.R. 1983), *pet denied* 17 M.J. 204 (C.M.A 1983), for its

authority. In *Woodyard* this Court permitted the introduction of homosexual magazines in the possession of Woodyard at a time when he attempted to perform oral sodomy on his male roommate. The theory for admissibility was that the magazines were highly probative of his intent. We believe that same theory is applicable here.

The first of the magazines offered by the government in this case was labeled as a sex education manual and, as found by the military judge:

> It depicts people from birth to adulthood, young children nude of opposite sex together not in suggestive poses, a young boy holding an erect penis, a father naked playing with his youngish naked daughter, a young boy with an erection touching the small breasts of a young but older female, and a young girl fondling the penis of a younger male, and et cetera.

As described by the military judge, the manual contains approximately 140 pages of photographs of naked children and adults. In some poses, the adult models are engaging in sexual activities while the children are apparently watching. The other two magazines "depict young ladies having reached puberty in various poses with at times sexual aids, some nonelectric, others apparently of the electric type. Most of these young girls appear developed, with breast development and pubic hair. None appear to be non-teenagers." This Court would further note that in most of the photographs the young ladies are either using a sexual device, or have one or more fingers inserted in their vaginas.

The real issue at stake here is whether the government's evidence is relevant to the purpose for which it was offered, and that was to show appellant's intent at the time he committed the alleged acts. Relevant evidence, as de-

fined in Mil. R. Evid. 401, is "any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Applying this standard, we find the magazines meet this test. All three exhibits would seem to appeal to a reader who is interested in viewing naked children and young, teenage girls who are masturbating with either their fingers or electric and nonelectric sexual devices. This relevancy argument is stronger with respect to the magazines than it is to the publication labeled as a sex education manual. However, the relevance of the manual is enhanced by virtue of the fact it was found in the tool chest with the other magazines, the electric artificial penis, the jar of vaseline, and other items. A.L.M. was shown the electric penis and jar of vaseline and was able to identify both items as ones which were used by appellant to perpetrate the offenses. We find that all three exhibits are relevant and admissible in that they tend to show that appellant's indecent acts with his daughter were motivated by his desire to arouse his lust and sexual desires.

Appellant also argues that the magazines are not admissible under *Woodyard, supra*, because they were not found at the scenes of the indecent acts, but rather, in a locked tool box in their quarter's storage shed. There is no evidence the magazines were in the room with appellant when he committed the acts on A.L.M., but he admitted they had been acquired previous to the time of the alleged offense. The absence of any evidence they were in the room with appellant when he was committing the offenses does not detract from or dimish their ability to be considered on the issue of appellant's intent. Therefore we find they were properly admitted into evidence.

The uncharged misconduct evidence appeared in the form of testimony by M.M., the eleven year old adopted

son of appellant, and half-brother of A.L.M. Following defense objection, M.M. was permitted to testify that four or five years ago, while the family was living in Alaska, appellant committed several sex offenses on M.M. At the time of these offenses M.M. was seven years old and his mother was out of the house. One of the offenses was that, on one occasion, appellant sucked M.M.'s penis. The other offenses were that, on approximately four occasions, appellant took M.M. and A.L.M. into the bathroom. With both of them naked, he would have M.M lay on A.L.M. and attempt to place M.M's penis into her vagina. A.L.M. variously testified, either these events did not happen, or she does not remember them happening. The government's theory of admissibility was that the acts were evidence of a common scheme or plan. Mil. R. Evid. 404b. Appellant objected that these acts were not "close enough in time, place and circumstances to be relevant," and further, they were not plain, clear and conclusive in light of A.L.M.'s failure to corroborate M.M.'s testimony. We agree with appellant on both points and find the military judge abused his discretion in admitting the testimony of M.M.

Having found error, we must now test for prejudice. Error not of constitutional dimension may be found harmless only upon the determination either that the finder of fact was not influenced by it, or that the error had but a slight effect on the resolution of the issues of the case. *See United States v. Barnes*, 8 M.J. 115 (C.M.A. 1979); *United States v. Mendoza*, 18 M.J. 576 (A.F.C.M.R. 1984). In the case before us we find the government presented sufficient, credible evidence in the form of testimony from A.L.M., her mother, and medical personnel, as well as physical evidence discovered in appellant's tool chest, to convince us of appellant's guilt beyond a reasonable doubt. In light of this, we find the in-

admissible evidence had a minimal impact, if any, on the resolution of the issues of this case. Thus, we find the military judge's admission of M.M.'s testimony regarding uncharged misconduct was harmless error.

We have examined the remaining assignments of error and find them to be without merit. Accordingly, the findings of guilty and the sentence are AFFIRMED.

FORAY, Senior Judge, concurs.

MURDOCK, Judge (concurring in result)

I agree that there was jurisdiction to try this case by court-martial and that the uncharged misconduct was improperly admitted. I cannot agree, however, that the three sexually oriented magazines were admissible.

An inherent difficulty in dealing with sexual topics in legal opinions is that in our culture sexual topics are generally considered to be private. Discussion of sex is only partly emerging from the taboos and inhibitions that kept the subject from being considered fully and honestly in the past. The moral overtones associated with sexual topics may make it difficult for court-martial panels to be guided only by legal considerations when they are deliberating on a sex offense.

The magazines involved in this case should be admissible only if they can be related to the charged offenses. R.C.M. 402. The military judge admitted them as some indication that the appellant's intent in abusing his children was to satisfy his own lust and sexual desire. In my opinion they demonstrate only that the appellant was interested in sexual topics, and not that he had a preference for sexual activities with children.

Two of the publications involved in this case could be described as "girlie magazines." They present women in startling and crude poses. Because of this, there may be a

tendency to dismiss those who possess them as perverted and capable of any bad sexual act. This same faulty logic would be used to argue that possession of car magazines would support a proof of intent to steal a car. Evidence rules governing admissibility are designed to protect against this type of loose connection between the evidence and the charges. *See* Mil. R. Evid. 403 and 404. Despite their overall crude contents, these magazines contain no pictures or articles which appear to be aimed at arousing prurient interest in activities with children. In fact, to state, as both the trial judge and the majority have, that the models are teenagers seems to be a kind exaggeration. Many of them appear to be significantly older than that. In any case, they are not grade school children, as was the victim in this case. Many of the pictures in these magazines are of adult women using sex aids similar to the one the appellant used on his daughter. This should not render the magazines admissible any more than pictures showing guns should, by themselves, render a magazine admissible on a murder charge.

The other publication is a sex education manual. It treats its subject in a frank and almost confrontational way that may offend some readers. It does not show or suggest to me, however, any of the illegal acts with children of which the appellant is charged.

All these publications were found hidden in the appellant's toolbox along with the items the appellant used to abuse his daughter. This secrecy does not enhance their relevance. It is obvious the appellant wanted to keep the magazines private. It is impossible to determine much more about the appellant's purpose for having the magazines. It takes more than mere position to make an item relevant, it must relate in some way to the charges being tried. Mil. R. Evid. 401.

Like the majority, I turn to *United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R. 1983) for guidance. Unlike the majority, I conclude that it was the direct relationship between the homosexual materials Woodyard was found with and the attempted homosexual assault with which he was charged that rendered the materials admissible. I do not find that same congruence between this appellant's charges and the magazines which are the subject of this appeal. I would find them inadmissible as being irrelevant, however, since the other evidence of the appellant's guilt was so extensive, I would find the error harmless and affirm.

OFFICIAL

/s/ CHARLES L. WILLE
CHARLES L. WILLE
Captain, USAF
Chief Commissioner

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(2)

No. 87-2020

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLARD W. MANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge erred in allowing the prosecution to introduce three sexually oriented magazines into evidence during its case-in-chief in order to prove petitioner's specific intent, an essential element of the charged crimes, without first waiting to see if the defense contested that element of the crime.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Statutes and rules:

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-11a) is reported at 26 M.J. 1. The opinion of the Air Force Court of Military Review (Pet. App. 12a-22a) is reported at 21 M.J. 706.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 11, 1988. The petition for a writ of certiorari was filed on June 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a general court-martial at Homestead Air Force Base in Florida, petitioner, a member of the United States Air Force, was convicted of sodomy and indecent acts upon a child under the age of 16, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925 and 934. He was sentenced to con-

finement for 25 years, a dishonorable discharge, and ancillary punishments. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 12a-22a). The Court of Military Appeals affirmed (*id.* at 1a-11a).

1. Petitioner was convicted of three specifications of committing indecent acts upon his nine-year-old daughter Amy, with the specific intent to arouse his sexual desires, and one specification of sodomy upon Amy.[1] The crimes occurred in the family home while petitioner was stationed at the Homestead air base.

The primary evidence against petitioner consisted of Amy's testimony. She testified that petitioner had first molested her some years beforehand when the family was living in Alaska (Tr. 75-79), and that he continued to do so after they moved to Florida (Tr. 79-81). She said she did not tell anyone about the incidents because petitioner had threatened to beat her if she did (Tr. 81-82). The molestation consisted of petitioner's touching the area between Amy's legs and inserting his finger into her vagina (Tr. 76, 79-80). She knew his finger was inside because she could feel it move (Tr. 76, 80).

After the family moved into government quarters on the Homestead base in April 1983, petitioner continued to molest Amy and to threaten her with a beating if she told anyone about it the incidents (Tr. 83-84, 89, 95, 96). These episodes usually occurred on Thursday nights, when Amy's mother was attending "Weight Watchers" meetings and the other children were playing elsewhere (Tr. 84). On

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[1] Petitioner was acquitted of a specification alleging indecent acts against his other daughter, Mary, and a specification alleging an assault upon his wife.

one of those occasions, petitioner placed his tongue inside Amy's vagina and moved it around (Tr. 85). On another occasion, petitioner applied vaseline to an oral thermometer and inserted it into her vagina (Tr. 87-88). When Amy told petitioner that it hurt, petitioner told her to be quiet or he would "stick a needle" into her (Tr. 89). Amy further testified that on another occasion, again on a Thursday night when her mother was away, petitioner used his socks to tie Amy to a wooden ladder-back chair, and then tipped it against the bed in his bedroom, so that she was facing the ceiling (Tr. 89-92). He then removed her pants and underwear and attempted to insert a rubber device into her vagina (Tr. 93-94). When Amy made up an excuse about having to use the bathroom, petitioner let her go. She went to the bathroom and locked the door behind her (Tr. 94). Amy later identified a motorized artificial penis that petitioner kept in his toolbox as the rubber device petitioner had used, and she testified that it was moving when he attempted to insert it into her vagina (Tr. 94-95, 155, 179; PX 2). She did not tell anyone about those events until after her parents had separated and she was living with her mother and siblings in California (Tr. 97, 156-157).[2]

2. Before trial began, the prosecution moved to introduce as part of its case-in-chief three magazines (PXs 3-5)[3] that petitioner kept in his toolbox along with the

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[2] A subsequent physical examination revealed scarring in Amy's posterior forchette (the area where tissues meet at the rear of the vaginal opening) that was consistent with the sexual abuse she described (Tr. 170-171; AX 7).

[3] Prosecution Exhibit 3 was entitled *Show Me*, a self-professed sex education manual for children; Prosecution Exhibit 4 was entitled *Young Snatch*; and Prosecution Exhibit 5 was entitled *Tight Twats*.

artificial penis and a jar of vaseline (Tr. 28, 37, 39, 43).[4] The defense objected on three grounds: the magazines were not relevant; they were being offered simply to show that petitioner was a man of bad character; and they were unduly prejudicial (Tr. 28-29; see Tr. 41). The trial judge admitted the magazines, finding them to be relevant on the issue of petitioner's intent to arouse or gratify his sexual desires, which was an essential element of the charged indecent act offenses (Tr. 42-43).

Petitioner pleaded not guilty to all the charges and denied that the offenses occurred (Tr. 9, 174-178). He ad-

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The court of military review described them as follows (Pet. App. 17a):

> The first of the magazines offered by the government in this case was labeled as a sex education manual and, as found by the military judge:
>
> > It depicts people from birth to adulthood, young children nude of opposite sex together not in suggestive poses, a young boy holding an erect penis, a father naked playing with his youngish naked daughter, a young boy with an erection touching the small breasts of a young but older female, and a young girl fondling the penis of a younger male, and et cetera.
>
> As described by the military judge, the manual contains approximately 140 pages of photographs of naked children and adults. In some poses, the adult models are engaging in sexual activities while the children are apparently watching. The other two magazines "depict young ladies having reached puberty in various poses with at times sexual aids, some nonelectric, others apparently of the electric type. Most of these young girls appear developed, with breast development and pubic hair. None appear to be non-teenagers." This Court would further note that in most of the photographs the young ladies are either using a sexual device, or have one or more fingers inserted in their vaginas.

[4] The artificial penis and jar of vaseline were separately admitted into evidence without defense objection (Tr. 27; PX 2).

mitted owning the artificial penis (PX 2), but he claimed that he had purchased it in Alaska as a "gag gift" for a friend and later was too embarrassed to give it to her (Tr. 179). He could not explain why he had kept it, however (Tr. 205-206). He also admitted owning the magazines and keeping them where they were found in his toolbox. According to petitioner, he purchased the magazine *Show Me* (PX 3) in Alaska for the purpose of using it to answer the children's questions about sex, but never used it because it was too "explicit" (Tr. 180).[5] Petitioner testified that he purchased the other two magazines (PXs 4, 5) in California and kept them for his own entertainment (Tr. 181, 210-211). He said that his wife and children were confused or lying (Tr. 192, 204), but he agreed that they had much to lose if he was convicted, and he could not think of a reason why they would lie (Tr. 197, 201).

In his final instructions to the court-martial panel, the trial judge told the panel members that they could consider the magazines only on the issue whether petitioner entertained the specific intent necessary for the indecent act crimes (Tr. 264).

ARGUMENT

Petitioner's claim is quite narrow. He does not challenge the Court of Military Appeals' conclusion that engaging in indecent acts with a child under 16 is a specific intent crime, requiring the prosecution to prove beyond a reasonable doubt that he committed the acts with the intent to arouse, appeal to, or gratify his lust or passions or sexual desires. Pet. App. 5a. Nor does he deny that the

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[5] Petitioner's wife testified that she had never seen the book prior to finding it in the toolbox, nor had she and petitioner ever discussed using *Show Me* to answer the children's questions about sex (Tr. 155).

magazines were probative of that element of the offense. Finally, petitioner does not challenge the unanimous finding of the military courts that the probative value of the magazines outweighed their potential prejudicial effect. *Id.* at 6a-7a, 18a; Tr. 42-43. Instead, petitioner claims that the magazines were not admissible under Mil. R. Evid. 404(b)[6] because his complete denial that he committed the charged indecent acts did not place his intent in issue in this case. The trial judge therefore erred, according to petitioner, by admitting the magazines before the defense had presented its case. Petitioner did not assert that objection at trial, however, and therefore has waived his claim. In addition, unless the trial court's decision to admit the magazines was erroneous on the merits, the timing of its decision is immaterial. Petitioner, however, has not challenged the merits of the trial court's decision. In any event, petitioner's claim is unpersuasive.

1. As a general rule, any element of a crime that the prosecution must prove beyond a reasonable doubt is a material issue in the case unless the defendant pleads guilty or affirmatively removes that element from consideration by the trier of fact—for example, by stipulating that it need not be proved by the prosecution. "A simple plea of not guilty." like the one petitioner entered, "puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States,* No. 86-6109 (Feb. 24, 1988), slip op. 6. Because the indecent act offenses

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[6] Mil. R. Evid. 404(b), which was taken from and is substantially similar to Fed. R. Evid. 404(b), provides as follows:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

with which petitioner was charged are specific intent crimes, petitioner's not guilty plea put the government to its burden of proof as to his intent, the sole issue to which the magazines related. The trial judge therefore acted within his broad discretion in admitting the magazines, because they were relevant to an issue in the case.

Petitioner contends (Pet. 6) that his not guilty plea did not truly put his intent in issue, because the charged indecent acts "speak for themselves," *i.e.*, the finding that he committed the charged acts would inevitably lead to the conclusion that he did so with the requisite intent. Petitioner maintains that the prosecution should be forbidden in any such case from introducing other acts evidence before the accused has presented his defense.

There is no good reason to adopt the broad per se rule that petitioner urges. First, petitioner's submission finds no support in the text of Mil. R. Evid. 404(b). Rule 404(b) lists the situations in which other acts evidence may be admitted. It does not require that a trial judge wait until the defense has completed its case before ruling on the admissibility of evidence offered by the prosecution. The timing of such decisions has historically been left to the broad discretion of trial courts. As this Court recently observed in connection with Fed. R. Evid. 404(b), "[t]he trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice." *Huddleston* v. *United States*, No. 87-6 (May 2, 1988), slip op. 9.

Petitioner's suggestion is also unsound as a policy matter. The probability (or even the likelihood) that the trier of fact will infer intent simply from the government's evidence that the defendant committed the charged acts does not mean that the trier of fact will necessarily draw that inference, or that the prosecution should be limited to

relying on such an inference to meet its burden of proof. Although an inference of intent would satisfy the prosecution's burden as a matter of due process (*Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 10), the constitutional standard for sufficiency of the evidence should not be used to define the limits of the government's ability to prove its case. The defendant is adequately protected from undue prejudice by the four safeguards identified in *Huddleston*: the Rule 402 requirement that the evidence be relevant; the Rule 404(b) requirement that the evidence be admitted for a proper purpose; the balancing of the probative value of the evidence against its potential for undue prejudice required by Rule 403; and the requirement in Rule 105 that upon request the trial judge must instruct the trier of fact about the limited purposes for which the evidence may be considered. *Huddleston* v. *United States*, slip op. 10-11.[7] The defendant therefore should not be entitled unilaterally to force the prosecution to forgo the use of otherwise probative evidence and to rely instead on an inference that may or may not be drawn by the trier of fact.

For these reasons, several courts of appeals have ruled that when the defendant pleads not guilty to a crime with a specific intent element, the prosecution may introduce other acts evidence during its case-in-chief to prove his intent, even if the defendant does not contest the intent element of the charged crime. *United States* v. *Burkett*, 821 F.2d 1306, 1309 (8th Cir. 1987); *United States* v. *Henthorn*, 815 F.2d 304, 308 (5th Cir. 1987); *United States* v. *Townsend*, 796 F.2d 158, 161-162 (6th Cir. 1986); *United States* v. *Nahoom*, 791 F.2d 841, 845 (11th Cir. 1986); *United States* v. *Liefer*, 778 F.2d 1236, 1242-1243 (7th Cir.

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[7] The provisions of Mil. R. Evid. 105, 402, and 403 are not materially different from their counterparts in the Federal Rules of Evidence.

1985); *United States* v. *Franklin,* 704 F.2d 1183, 1188 (10th Cir.), cert. denied, 464 U.S. 845 (1983); *United States* v. *Buchanan,* 633 F.2d 423, 426 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981); cf. *United States* v. *Feldman,* 788 F.2d 544, 557 (9th Cir. 1986) (evidence used to prove the defendant's motive).

Petitioner claims that the decision below conflicts with dictum in *United States* v. *Fearns,* 501 F.2d 486 (7th Cir. 1974), to the effect that the trial judge should wait until the defense has presented its case in order to see whether it contests intent before allowing the prosecution to introduce other acts evidence. That claim lacks merit. Subsequent Seventh Circuit decisions have limited the dictum in *Fearns* (which in any event was merely a suggestion, not a directive) to general intent crimes. Where the crime has specific intent as a separate element, the rule in the Seventh Circuit is that the defendant's not guilty plea places his intent in issue for purposes of Rule 404(b).[8] The Second Circuit decision on which petitioner relies, *United States* v. *Leonard,* 524 F.2d 1076 (1975), cert. denied, 425 U.S. 958 (1976), upheld the admission of other acts evidence during the prosecution's case-in-chief, and did not adopt the rule that petitioner urges. 524 F.2d at 1091-1092.[9] Accordingly, there is no conflict warranting

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[8] *United States* v. *Brantley,* 786 F.2d 1322, 1329 (7th Cir.), cert. denied, 477 U.S. 908 (1986); *United States* v. *Liefer,* 778 F.2d at 1242-1243; *United States* v. *Chaimson,* 760 F.2d 798, 804-806 (7th Cir. 1985); *United States* v. *Shackleford,* 738 F.2d 776, 781-782 (7th Cir. 1984); *United States* v. *Weidman,* 572 F.2d 1199, 1202 (7th Cir.), cert. denied, 439 U.S. 821 (1978); *United States* v. *Juarez,* 561 F.2d 65, 73 (7th Cir. 1977).

[9] Other Second Circuit decisions have indicated that the admission of other act evidence to prove intent may be erroneous when there is an " 'unequivocal concesssion of the element by the defendant' " (*United States* v. *Peterson,* 808 F.2d 969, 974 (1987) (citation

this Court's review.[10]

2. Finally, the admission of the magazines did not prejudice petitioner's substantial rights. Art. 59(a), UCMJ, 10 U.S.C. 859(a); Mil. R. Evid. 103(a).[11] The evidence against petitioner apart from the magazines amply proved that he committed the indecent acts, as the Court of Military Appeals noted (Pet. App. 9a), and the inference that he did so with the requisite intent was "overpowering." *Rose* v. *Clark*, slip op. 10. Even petitioner candidly admits (Pet. 6) that, if the panel members found that he committed those acts, they would also

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omitted)), or when the defense "express[es] a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed." *United States* v. *Figueroa*, 618 F.2d 934, 942 (1980). Petitioner has not satisfied that standard, however. See Tr. 259, 261, 264, 265 (panel instructed, without defense objection, on the need to find petitioner's intent).

[10] *People* v. *Kelley*, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967), cited by petitioner (Pet. 6), is inapposite, since it involved a matter of state, not federal, evidence law. Moreover, the evidence was ordered excluded in that case in part because it involved acts that were too dissimilar to and remote from the ones charged against the defendant. 66 Cal. 2d at 246-247, 424 P.2d at 957, 57 Cal. Rptr. at 373.

[11] Article 59(a) and Rule 103(a) preclude reversal of a conviction based on errors that did not materially prejudice the defendant's substantial rights. A similar standard is applied in the federal courts. Fed. R. Crim. P. 52(a). Absent an error of constitutional dimension, the harmless error determination in a case like this one should be governed by military law. Cf. *Chapman* v. *California*, 386 U.S. 18, 21 (1967) ("The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law.").

necessarily have found that he did so intentionally. Under these circumstances, any error in admitting the three magazines could not have contributed significantly to the verdict. See *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946).[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] The fact that petitioner was convicted of the crimes against his daughter Amy, but was acquitted of the alleged indecent act against his other daughter, demonstrates that the members based their findings on Amy's testimony, and not on any belief that petitioner was simply a man of bad character because he owned the magazines. Moreover, Amy's testimony was clear, consistent, and unwavering. She described the alleged incidents in great detail, and her testimony was corroborated by the medical evidence and by petitioner's admitted possession of the artificial penis identified by Amy as the one that he had used on her.

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